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Supreme Court
FILE
SEP 8 19
MICHAEL RODAK, J

IN THE

Supreme Court of the United States

October Term, 1980

No. _____

W. C. McDANIEL, ET AL.,
Petitioners

v.

JOSE SANCHEZ, ET AL.,
Respondents

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in holding that a proposed reapportionment plan, submitted by a local legislative body in response to an invalidation of a prior plan, does not lose its status as a legislative rather than court-ordered plan for purposes of the preclearance provisions of the Voting Rights Act, 42 U.S.C. 1972(c) merely because it is the product of litigation conducted in a federal forum?

2. Did the Court of Appeals err in holding that a new reapportionment plan enacted by a state, including one purportedly adopted in response to the invalidation of the prior plan by a federal court, will not be considered effective as law until it has been submitted and has received clearance pursuant to the preclearance provisions of the Voting Rights Act, 42 U.S.C. 1973(c)?

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Respondents, Jose Sanchez, Israel Trevino, Natividad De La Rosa, and Santos De La Rosa and the classes they represent, respectfully pray that Petitioners' Petition For Writ Of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on April 14, 1980, in Fifth Circuit Cause No. 80-1108, be denied.

STATEMENT OF THE CASE

Pursuant to Rules 22 and 34.2 of the Supreme Court, the Respondents, while not concurring totally with the Petitioners' characterization of the facts, will not restate

the case beyond correcting the following inaccuracies and omissions:

Testimony from the December 10, 1979 hearing on the plan revealed that the Petitioners, in fulfillment of their legislative duty to reapportion, decided to employ a statistician, Robert Nash, Ph.D., to assist them in the drafting of a new redistricting plan, (R. 8, 21, 22). After hiring Dr. Nash, the Petitioners gave him instructions on how to draft the redistricting plan, which he followed, (R. 22, 25, 26). After at least three meetings with the Petitioners, in both formal Commissioners Court meetings and informal meetings, Dr. Nash completed the plan, (R. 23, 24). He then presented the plan to the Commissioners Court at a formal meeting called in the ordinary course of that legislative body's business. After explaining the plan to the Petitioners, Dr. Nash was asked by the Petitioners to make a correction, which he did, (R. 25, 26). The Petitioners then officially adopted the plan at a formal meeting as the plan they would submit to the district court, (R. 40), and the plan they would officially adopt if the district court permitted them to do so, (R. 40, 41). When asked why the Commissioners Court did not consider either of Respondents' plans, the County Judge stated the Commissioners Court would rather "redistrict ourselves" if given the opportunity by the district court, (R. 42, 43).

On January 14, 1980, the district court entered an order adopting the Petitioners' plan without modification. The district court found the plan satisfied the principle of one-person, one-vote but made no finding in relation to the dilution of minority voting rights and at the same time found that Section 5 preclearance was unnecessary, (Appendix, p. A-22).

SUMMARY OF THE ARGUMENT

No significant conflict exists between the courts below in differentiating legislative apportionment plans pursuant to *Wise v. Lipscomb,* 437 U.S. 535 (1978) and court-ordered apportionment plans pursuant to *East Carroll Parish School Board v. Marshall,* 424 U.S. 636 (1976). Indeed, the Court of Appeals for the Fifth Circuit is so certain of the difference between *Wise* and *East Carroll,* as applied to the facts of the instant case, that they summarily reversed the district court and denied a rehearing and a rehearing en banc. Because there is no significant confusion of the law in the courts below and because the facts of this case do not raise any new issues previously unresolved by this Court, this case cannot be considered to be of national importance and certiorari should be denied.

REASONS FOR DENYING THE WRIT

The Petitioners argue that sound judicial discretion dictates that a writ of certiorari should be issued because of a perceived inability on the part of the Court of Appeals to accurately distinguish between a court-ordered plan and a legislative or court-adopted plan in light of this Court's rulings in *Wise v. Lipscomb, supra,* and *East Carroll Parish School Board v. Marshall, supra.* Additionally, the Petitioners argue that this apparent confusion will generate even more uncertainty in the wake of 1980 reapportionment litigation. After a brief comparison of the instant case to *East Carroll, Wise* and *Marshall v. Edwards,* 582 F.2d 927 (1978), *cert. den.* 442 U.S. 909 (1979), the Petitioners conclude that the present case involves a court-ordered plan which is not subject to the

Section 5 preclearance requirement as the Petitioners interpret the legislative history of the Voting Rights Act. Respondents disagree with this analysis and in support thereof offer the following points and authorities:

I.

No Significant Conflict Exists Among The Circuits In Differentiating Legislative Apportionment Plans Pursuant To *Wise* And Court-Ordered Plans Pursuant to *East Carroll.*

After this Court's *per curiam* decision in *East Carroll,* confusion existed over the definition of a legislative apportionment plan and a court-ordered apportionment plan. The confusion partially was a result of this Court's brief discussion of a court-ordered plan vis-a-vis a legislative plan in dicta found in footnote 6 of *East Carroll.* Since the decision in *East Carroll,* however, this Court has clarified the pre-existing confusion, *Wise, supra,* and *Connor v. Coleman,* 440 U.S. 612 (1979). In *Wise,* a decision rendered just two terms ago, this Court, in a lengthy opinion, explained the difference between the two types of election plans, providing much needed guidance to the courts below.

The Petitioners argue that the Court of Appeals for the Fifth Circuit has incorrectly interpreted *East Carroll* and *Wise* and that therefore this Court should intervene and supply assistance. The Petitioners are not arguing that a conflict exists among the various circuit courts of appeal. Indeed, this researcher could find no cases outside of the Fifth Circuit that discuss the difference between a court-ordered apportionment plan and a legislative apportion-

ment plan in relation to *Wise* and *East Carroll.* If any confusion exists, then, the confusion must be found within the Fifth Circuit itself. However, with the exception of *Marshall v. Edwards,* 582 F.2d 927 (5th Cir. 1978) *cert. den.* 442 U.S. 909 (1979), there have been no Fifth Circuit cases that were decided with a dissenting vote on the issue of whether or not an apportionment plan is court-ordered or legislative in character. The instant case is typical. The Fifth Circuit in a *per curiam* opinion, summarily reversed the district court's categorization of the instant plan as a court-ordered plan; a categorization reached simply because the plan was prepared during the course of litigation. A rehearing and a rehearing en banc was denied. Apparently, none of the twenty-four judges in active service on that court perceived any confusion with regard to the issue at hand. The Petitioners' argument for clarity in the midst of what they perceive as confusion amounts to nothing more than an illusory argument which will not support a grant of certiorari.

II.

The Instant Case Does Not Involve Issues of National Significance.

The Petitioners' argument that this case presents issues of national significance is premised on their claim that confusion exists in the courts below, which this Court should clarify. As stated earlier, the confusion in the courts below created by this Court's dicta in *East Carroll* has been clarified by this Court's later ruling in *Wise.* Hence, this case lacks national significance and certiorari should be denied. And, assuming, *arguendo,* that a conflict exists in the courts below, the issues and facts raised

by this case would be of no assistance in clarifying *Wise* or *East Carroll.*

The issue raised on appeal below was restricted to the district court's order dated January 10, 1980, wherein the court reasoned that because the "Kleberg County Commissioners' Court did not reapportion the Commissioners' Court precincts on their own authority, but instead did so in *response* to a court order," the reapportionment plan "is a court-ordered plan rather than a court-adopted plan and therefore is not subject to the preclearance provisions of the Voting Rights Act." (Emphasis added) (Appendix, district court's order, p. A-23; also see framing of the issue on appeal by the Court of Appeals, p. A-27). It was this issue alone that the Court of Appeals decided and it is this issue alone that was raised by the district Court's order. (Appendix, p. A-23, A-27).

The Petitioners argue in their petition matters which were never considered in the district court's order and the Court of Appeals' decision. (Appendix, p. A-21, A-26). The Petitioners apparently have chosen to expound on new theories of relief which may prove more fruitful to them at this juncture of the case. This type of free-for-all appellate approach urged by the Petitioners should be discouraged because it does a disservice to the district court and the Court of Appeals as well as to the integrity of the appellate process. Indeed, Justice White, when announcing the decision of this Court in *Wise,* declined to consider the impact of Section 5 to that case, where the State of Texas became subject to the Voting Rights Act while the case was on appeal, because the "Court of Appeals did not deal with it one way or another." *Wise, supra,* 437 U.S. at 547. This decision was supported by

all of the Justices and the Chief Justice of this Court. *Wise, supra,* 437 U.S. 547, 549, 550. Similarly this Court should decline the petitioners' invitation to review matters of the first instance which were not presented to the district court and the Court of Appeals. For these reasons, Petitioners' request for certiorari should be denied without further consideration.

However, should this Court desire to pursue issues not previously determined by the courts below then Respondents would contend that this case is controlled by the decision in *Wise v. Lipscomb, supra,* not by the dicta found in a footnote in this Court's *per curiam* decision in *East Carroll.*

In *East Carroll,* the district court adopted an at-large reapportionment plan without discussing the relative merits or demerits of a single-member plan. This Court held that when United States district courts are "put to the task of fashioning reapportionment plans to supplant concededly invalid state legislation", single-member districts are to be perferred absent unusual circumstances. And, that "in shaping remedial relief" the district court abused its discretion in not initially ordering a single-member reapportionment plan, *East Carroll, supra,* 424 U.S. at 639, 640. Additionally, in dicta found in a footnote in *East Carroll,* the applicability of Section 5 of the Voting Rights Act to legislative and court-ordered election plans is discussed. This dicta apparently is the result of issues raised solely in the amicus brief of the United States, which neither of the parties briefed or argued. In the footnote discussion of legislative plans and court-ordered plans no mention whatsoever is made of *Burns v. Richardson,* 384 U.S. 73 (1966). *Burns* involved a legis-

lative apportionment plan where the legislative body lacked authority to enact the plan, consequently, the plan had to be implemented by court order. Because of the failure of the *East Carroll per curiam* opinion to cite *Burns,* Respondents agree with Justice Powell in his concurring opinion in *Wise,* that *East Carroll* should be read as turning on its peculiar facts, *Wise, supra,* 437 U.S. at 549.

Several facts in *East Carroll* which were determinative of that plan becoming a court-ordered plan do not exist in the instant case. First, the submission of the plan was "precipitated" by the court after the 1970 census was published and was not the result of having the existing apportionment scheme declared unconstitutional, as in the instant case, thereby increasing the level of judicial involvement in *East Carroll, Zimmer v. McKeithen,* 485 F.2d 1297, 1301 (1973). Second, the plan in *East Carroll* that was submitted was not a legislative plan, but rather a resubmission of the judicially-inspired "consent decree" plan of 1968, unlike the legislatively-created plan in the instant case, *Marshall v. Edwards,* 582 F.2d 927, 929 (1978), *cert. den.* 442 U.S. 909 (1979). Third, the plan in *East Carroll* that was submitted was not adopted by the legislative body, as in the instant case, (R. 40, 41); instead, it was endorsed by only a few members of the legislative body, *Zimmer v. McKeithen,* 467 F.2d 1381, 1383 (5th Cir. 1973). And, finally, the enabling legislation which would have permitted the parish police jury to propose an at-large system was opposed by the Attorney General under Section 5; hence, the jury could not propose a constitutionally valid plan nor did the jury have the authority to enact a constitutionally valid plan. Here, however, the Petitioners hired an expert, consulted

with him and were the architects of a plan that the district court acquiesced in adopting. Furthermore, the Petitioners had the authority to enact the plan, as is more fully explained below.

The Petitioners also argue that *Wise v. Lipscomb*, 437 U.S. 535 (1978) does not apply to the instant case. In *Wise*, an action was brought by certain minority-race residents of Dallas, Texas, against the mayor of Dallas and members of the Dallas city council. The district court held that the at-large system of electing city council members, as mandated in the city charter, unconstitutionally diluted the voting strength of black citizens. The court then afforded the city council an opportunity to prepare a constitutional reapportionment plan. Thereafter, the city council proposed an ordinance that would provide for eight council members to be elected from single-member districts and for the remaining three members, including the mayor, to be elected at large. The district court then approved the plan and the city council formally enacted the ordinance. Later the district court issued an opinion sustaining the council's plan as a valid legislative act, notwithstanding state constitutional and statutory provisions requiring a referendum vote to amend the city charter. *Lipscomb v. Wise*, 399 F.Supp. 782 (N.D. Tex. 1975). On appeal, however, the Court of Appeals reversed, holding that the district court had erred by evaluating the council's actions only under constitutional standards rather than also applying the principle that absent exceptional circumstances, "judicially imposed" reapportionment plans should employ single-member districts. *Lipscomb v. Wise*, 551 F.2d 1043 (5th Cir. 1977). The Supreme Court reversed and remanded. Although unable to agree on an opinion, six members of the Court agreed

that the "eight/three" ordinance was a "legislative plan" to be judged under the relatively more lenient constitutional standards, rather than a "judicial plan", subject to the stricter standards requiring single-member districts in the absence of special circumstances.

Justice White announced the judgment of the Court, and in an opinion joined by Justice Stewart, expressed the view that when the district court invalidated the provisions of the Dallas city charter mandating at-large council elections, the city had the duty to devise a substitute plan rather than to leave the matter to the district court. The court also found that the district court was entitled to consider the city council's substitute plan under the principles applicable to legislatively adopted reapportionment plans rather than judicially imposed plans. Furthermore, the Court observed that even though the council itself had no power to change the at-large system as long as the city charter was declared unconstitutional, the council was free to exercise its inherent legislative powers by enacting the eight/three plan. In conclusion this Court found that council's ordinance should not be regarded as a court-ordered plan subject to a level of scrutiny more stringent than that required by the Constitution.

Justice Powell, joined by Chief Justice Burger, and Justices Blackmun and Rehnquist, concurring in part and concurring in the judgment, agreed that the reapportionment plan adopted by the Dallas City Council was a "legislative" plan for purposes of review by a federal court. They further expressed the view that the plan was "legislative" regardless of whether the council had the power under state law to reapportion itself, the essential

point being that the city council had exercised a legislative judgment which reflected the policy choices of the elected representatives of the people rather than the directive of a federal court.

Justice Marshall, joined by Justices Brennan and Stevens, dissenting, expressed the view that since the Dallas city council had no authority under state law to reapportion itself, the plan ordered by the district court should have been evaluated in accordance with the federal common law of remedies applicable to judicially devised reapportionment plans. Even if the plan were properly to be viewed as a "legislatively enacted" plan, it should not be approved, since the nature of the underlying violation invalidating the original apportionment system under the city charter was the dilution of the voting power of a racial minority resulting from the effects of at-large voting, and thus it was inappropriate either for the local legislative body or a court to respond with more of the same.

The facts found in the majority opinion in *Wise* parallel the facts in the instant case. First, when the district court found the Kleberg County apportionment plan unconstitutional, the court, citing *Wise,* deferred judicial imposition of a plan pending action by the legislative body to reapportion itself. The legislative body in the instant case responded to its duty and decided, when given the opportunity, to "redistrict ourselves". (Testimony of Kleberg County Judge, W. C. McDaniel, R. 43). The Commissioners Court then adopted a plan for presentation to the district court as the plan they officially wanted and would, if permitted by the district court, adopt, (R. 40, 41). Second, the plans presented

in the instant case and in *Wise* were not in violation of any federal law, unlike the Section 5 opposition in *East Carroll.* Third, the Commissioners Court had the authority and enabling legislation to propose the plan they did and to act as the city council had in *Wise.*

Petitioners argue that *Tex. Elec. Code Ann.,* art. 2.04, which pertains to the redrawing of election precincts, constitutes a restriction on the powers granted the Commissioners Court in the Texas Constitution. Specifically, Petitioners argue that Art. 2.04 of the Texas Election Code prohibits the redrawing of election precincts except in a July or August term of the Commissioners Court, and since their plan was proposed in November, the Commissioners Court was without authority to act. The Petitioners rely on *Wilson v. Weller,* 214 S.W.2d 473 (Tex. Ct. Civ. App. 1948) for authority.

Petitioners in their argument overlook the fact that the Commissioners Court redefined the county precinct lines in the instant case without modifying the boundaries of the election precinct lines, (R. 50). In Texas, "commissioner court precincts" or "county precincts" are composed of electoral sub-units, known as "election precincts" or "voting precincts". Pursuant to Art. 5, Section 18 of the Texas Constitution, "commissioners court precincts" or "county precincts" are creations of the Texas Constitution while "election precincts" or "voting precincts" are statutorily created. *Texas Elec. Code Ann.,* art. 2.04. Since the Commissioners Court did not redefine the boundaries of the election precincts, they were not restricted by Art. 2.04 of the Texas Election Code and were free to act under Art. 5, Section 18 of the Texas Constitution.

Under Art. 5, Section 18 of the Texas Constitution the Commissioners Court is vested with the power and authority to divide the county "from time to time, for the convenience of the people, into precincts", no more than eight and no less than four. This provision of the Constitution, among other things, applies to the redistricting of county precinct lines. As the Court of Civil Appeals said in *Dowlen v. Rigsby,* 43 S.W. 271 (Tex. Ct. Civ. App. 1897); "When the (Commissioners) court was once established, no legislation was needed to enable it to exercise the powers given by the above provision (Art. 5, Section 18 of the Texas Constitution), to divide the county into precincts. The direction is plain and simple, and without condition or restriction, except that as to the number of precincts." *Ibid.* at 273. To date, this interpretation of the law is still in effect. Even the Petitioners' own authority, *Wilson, supra,* makes it clear that the Commissioners Court had the power and authority to act in the instant case.

In *Wilson,* the Commissioners Court redistricted two commissioners court precincts as well as two voting precincts on June 7, 1948. An action was brought challenging the authority of the Commissioners Court to issue the redistricting order. The Court of Civil Appeals upheld the issuance of an injunction by the District Court and found that the redistricting was improper because the Commisioners Court not only redistricted the county precincts, but also redistricted the voting precincts. In its opinion, the Court of Civil Appeals cited *Rigsby,* saying:

> Appellants rely upon State ex rel. Dowlen v. Rigsby, 17 Tex. Civ. App. 171, 43 S.W. 271, opinion by Judge Williams, who afterwards served with distinction as a member of the Supreme Court.

> In the case cited, it was held that under the constitutional grant of power contained in Article 5, section 18 of the Texas Constitution, Vernon's Ann. St., a commissioners' court could divide the county into commissioners' precincts and justice precincts whenever said court was of the opinion that the convenience of the people would be served thereby. In the Rigsby case it does not appear that election precincts were affected by the order there involved, or that the commissioners' court sought to transfer territory from one voting precinct to another. In the present case election precincts are involved and the order of June 7, 1947, insofar as it relates to election precincts is ineffective and void.

Wilson, supra, at 474.

Finally, the Petitioners argue that the legislative history of the Voting Rights Act indicates that the plan in the instant case should not be subject to Section 5 preclearance. Respondents disagree. The legislative intent behind the enactment of Section 5 of the Voting Rights Act was that cases like the instant one be precleared pursuant to Section 5 rather than escape preclearance under equitable jurisdiction of a district court. This is clearly expressed in the Senate Report on the Voting Rights Act Extension, which states in part:

> Thus, for example, where a federal district court holds unconstitutional an apportionment plan which predates the effective date of a coverage under the Voting Rights Act, any subsequent plan ordinarily would be subject to Section 5 review. In the typical case, the court either will direct the governmental body to adopt a new plan and present it to the court for consideration or else itself choose a plan from among those presented by various parties to the litigation. In either situation, the court should defer

> its consideration of—or selection among—any plans presented to it until such time as these plans have been submitted for Section 5 review. Only after such review should the district court proceed to any remaining fourteenth or fifteenth amendment questions that may be raised.

U.S. Code, Cong. & Admin. News, 94 Cong., 1st Sess. 1975, Vol. 2, p. 784, 785, Sen. Rpt. No. 94-295, p. 18, 19.

Certainly it was never intended by the authors of the Voting Rights Act that a plan could be adopted by a district court without a finding on the issue of dilution by either the district court or the United States Attorney General as in the instant case.

CONCLUSION

For the reasons set out above, Respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,

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